SUPREME COURT, U. S.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1967

No. 525

CAMPBELL SOUP COMPANY and BUTCHERS UNION LOCAL NO. 127, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

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Subject Index

Page

Opinion and order below 2

Jurisdiction 2

Questions presented 2

Statutes and regulations involved 3

Statement of the case 4

Reasons for granting the writ 4

I

The Court of Appeals has sanctioned the repudiation of a settlement agreement and the subsequent issuance of a complaint by the regional director, acts which were arbitrary, capricious, an abuse of discretion and beyond the jurisdiction of the regional director. In so doing the Court of Appeals has decided an important federal question in a manner conflicting with a decision of this court and sanctioned administrative activity so far departing from the accepted and usual course of Board proceedings as to call for the exercise of this court's power of review 4

II

The decision and order of the Board was not supported by substantial evidence on the record as a whole 4

III

The Court of Appeals has sanctioned a remedy by the Board which has no precedent in law, deprives company of its property without due process of law, unjustly enriches Union, does not effectuate any policies of the act, and constitutes a penalty 5

Conclusion 12

Table of Authorities Cited

Cases	Pages
Fibreboard Paper Products Corp. v. National Labor Relations Board, 379 U.S. 203 (1964), 85 S. Ct. 398, 13 L. Ed. 2d 233	9
International Ladies Garment Workers Union v. NLRB, 54 Labor Cases, para. 11664 (1967)	10
Republic Steel Corp. v. National Labor Relations Board, 311 U.S. 7 (1940), 60 S. Ct. 806, 85 L. Ed 6	10
The Virginia Elec. and Power Co. v. National Labor Relations Board, 319 U.S. 533 (1942), 63 S. Ct. 1214, 87 L. Ed. 1568	9

Statutes	
Administrative Procedure Act (5 USCA):	
Section 557(c)	3
Section 706	3
National Labor Relations Act:	
Section 1	6
Section 7	3
Section 8(a)(1)	3
Section 8(a)(2)	3
Section 8(a)(3)	2, 3
Section 8(b)(1)(A)	3
Section 8(b)(2)	3
Section 10(c)	6, 9
28 USC 1254(1)	2
29 USC 151 et seq.	3

Miscellaneous	
National Labor Relations Board:	
Rules and Regulations, Section 102.45	3
Statement of Procedure, Section 101.7	3

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No.

CAMPBELL SOUP COMPANY and BUTCHERS UNION LOCAL No. 127, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
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PETITION FOR A WRIT OF CERTIORARI
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Petitioners respectfully pray that a Writ of Certiorari issue for a review of the decision of the Court of Appeals for the Ninth Circuit entered in this case on May 23, 1967, enforcing an Order of the National Labor Relations Board.

OPINION AND ORDER BELOW

The opinion of the Court of Appeals is not yet reported but is printed in Appendix A hereto, *infra*, at page i along with the Court's Decree. The Board's findings of fact, conclusions of law and order are reported at 152 N.L.R.B. 1645 (1965).

JURISDICTION

The decision of the Court of Appeals was entered on May 23, 1967; a stay pending this petition was entered on June 20, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) Where the Regional Director of the Board offers a Settlement Agreement to the charged parties, and the charged parties fully execute and perform all of the terms thereof so that nothing is left of the dispute, can the Regional Director, upon mere subsequent reflection and contrary to the Board's well-established rules, as approved by this Court, repudiate the Agreement?

(2) Where the unfair labor practices charged against the Union and Company raise the question of whether employees were required involuntarily to join the Union before the expiration of the thirty (30) day grace period in §8(a)(3) of the Act (29 U.S.C. 158(a)(3)), and where the Trial Examiner has not made findings on the critical issue of volun-

tariness, has the Court of Appeals by granting enforcement of a Board order which envisions repayment of dues and initiation fees to possibly as many as 250-300 unknown, unnamed employees sanctioned the use by the Board of an assumption that employees do not want to join a union within the 30 days, an assumption which is nowhere authorized by law, nowhere supported by *any* record evidence or findings, and indeed contrary to the explicit statutory guarantee that an individual is free to join a union at any time he wants?

(3) Where Company and Union have jointly participated in an unfair labor practice consisting of checking off Union dues prior to the 30 day statutory period, and Company has paid all of such deducted dues to Union, may the Board fashion a remedy which makes Company jointly and severally liable with Union for reimbursement of said dues to the affected employees?

STATUTES AND REGULATIONS INVOLVED

The pertinent sections of the National Labor Relations Act, as amended, 29 U.S.C. 151 *et seq.*, hereinafter called the "Act", are set out in Appendix B hereto, p. xiii f. and specifically include §§ 7, 8(a)(1), (2) and (3), 8(b)(1)(A) and (2) of said Act. Sections 557(c) and 706 of the Administrative Procedure Act, 5 U.S.C.A., are set out in Appendix C hereto. Sections 101.7 of the Statement of Procedure and 102.45 of the Rules and Regulations of the National Labor Relations Board are set out in Appendix D hereto.

STATEMENT OF THE CASE

Company accepts and adopts the statement of the case contained in Union's petition and incorporates it by reference.

REASONS FOR GRANTING THE WRIT

I

THE COURT OF APPEALS HAS SANCTIONED THE REPUDIATION OF A SETTLEMENT AGREEMENT AND THE SUBSEQUENT ISSUANCE OF A COMPLAINT BY THE REGIONAL DIRECTOR, ACTS WHICH WERE ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION AND BEYOND THE JURISDICTION OF THE REGIONAL DIRECTOR. IN SO DOING THE COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A MANNER CONFLICTING WITH A DECISION OF THIS COURT AND SANCTIONED ADMINISTRATIVE ACTIVITY SO FAR DEPARTING FROM THE ACCEPTED AND USUAL COURSE OF BOARD PROCEEDINGS AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF REVIEW.

Company is unable to add to the succinct argument on these points in the petition filed by Union. Therefore, Company adopts and urges the argument presented by Union on pages 7 to 14 of its petition.

II

THE DECISION AND ORDER OF THE BOARD WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE.

Company is unable to add to the succinct argument on this point in the petition filed by Union. Therefore, Company adopts and urges the argument presented by Union on pages 14 to 16 of its brief.

III

THE COURT OF APPEALS HAS SANCTIONED A REMEDY BY THE BOARD WHICH HAS NO PRECEDENT IN LAW, DEPRIVES COMPANY OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW, UNJUSTLY ENRICHES UNION, DOES NOT EFFECTUATE ANY POLICIES OF THE ACT, AND CONSTITUTES A PENALTY.

Company concedes that the hiring practices followed by it prior to September, 1963, amounted to an inadvertent violation of the Act. However, the evidence in the record is uncontradicted that Company immediately corrected the matter when it was called to its attention. Nevertheless, the Board held Company jointly and severally liable with Union for reimbursement of dues collected despite the fact that Company had paid all of such dues to Union and Union is a financially responsible organization.

The Court of Appeals remarked that it was "not unsympathetic" with Company's contention that its liability for reimbursement of the dues should have been limited to secondary responsibility.

> "We are not unsympathetic with the Company's position and certainly the Board could have provided secondary reponsibility had it so chosen". (Appendix A, p. vi.)

The Court then proceeded to declare that the Board had discretion to provide such a remedy when both the Union and employer had engaged in "the discriminatory practice". (Appendix A, p. vi.) However, each of the cases cited by the Court of Appeals involved illegal discharges and the remedy for joint and

several liability for back pay in such cases is specifically authorized by Section 10(c) of the Act.

The remedy by the Board in the instant case is not specifically authorized by the Act. The only statutory authority for the Board's remedy in this case is found in Section 10(c) of the Act wherein it is provided that if the Board finds that a violation of the Act has been committed, it must state its findings of fact and issue an order requiring the person to cease and desist from the unfair labor practice, "and to take such affirmative action including reinstatement of employees with or without back pay as will effectuate the policies of this Act; provided, that where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him . . .".

Since the Act does not specifically provide for joint and several liability for reimbursement of dues, the action of the Board cannot be sustained unless it can be viewed as effectuating the policies of the Act.

The policies to be effectuated are stated in Sec. 1 of the Act, as follows:

> "Section 1. The denial by some employers of *the right of employees to organize* and *the refusal by some employers to accept the procedure of collective bargaining* lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the

current of commerce; (c) materially affecting, restraining or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The *inequality of bargaining power between employees* who do not possess full freedom of association or actual liberty of contract, *and employers who are organized in the corporate or other forms of ownership association* substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their

officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. (29 USCA 151.)"

This statute clearly sets forth the basic policies of the Act which are the encouragement of the practice and procedure of collective bargaining and the protection of the freedom of employees to organize and be represented by representatives of their own choosing.

The remedy here has nothing to do with implementing these policies. The record shows Company has done nothing to interfere with or hinder its employees in the exercise of their rights under the Act. To the contrary, Company has recognized Union as the

bargaining agent for its employees for many years and has freely and fairly entered into negotiations and contracts over a long period of time.

Company has been unable to discover a single precedent for the Board's remedy in this type of case and the Court of Appeals failed to cite any cases in point in sanctioning the remedy. Company contends that since the remedy cannot fairly be said to effectuate any purposes of the Act, it can be viewed only as an unlawful punitive measure against Company.

This Court has held that the remedy of the Board to undo the effects of unfair labor practices will not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." (*The Virginia Elec. and Power Co. v. National Labor Relations Board,* 319 U.S. 533, 540 (1942); 63 S. Ct. 1214, 87 L. ed. 1568; *Fibreboard Paper Products Corp. v. National Labor Relations Board,* 379 U.S. 203, 216 (1964), 85 S. Ct. 398, 13 L. ed. 2d 233.)

With reference to the Board's duty to command affirmative action which is remedial, not punitive, this Court has construed the meaning of Section 10(c) of the Act in the following language:

> "This language should be construed in harmony with the spirit and remedial purposes of the Act. We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think

would effectuate the policies of the Act. We have said that "this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such an order. We have said that the power to command affirmative action is remedial, not punitive. *Consolidated Edison Company v. National Labor Relations Board,* 305 U.S. 197, 235, 236. See, also, *National Labor Relations Board v. Pennsylvania Greyhound Lines,* 303 U.S. 267, 268. We adhere to that construction.

In that view, it is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end." (*Republic Steel Corp. v. National Labor Relations Board,* 311 U.S. 7, 11, 12 (1940), 60 S. Ct. 806, 85 L. ed. 6.)

In a quite recent case, the Circuit Court for the District of Columbia Circuit, stated:

"We find it difficult to see genuine meaning in a 'remedy' which is essentially negative in character and smacks of punitive action." (*International Ladies Garment Workers Union v. NLRB,* 54 Labor Cases, para. 11664 (1967).)

The evidence in the record shows that no money was ever deducted from an employee's paycheck for

the benefit of the employer. All deductions were for Union and were paid to Union. Union has retained possession of the monies, and is a financially responsible organization.

It would be a denial of due process and most unfair to require Company to pay to employees monies it collected for Union, paid to it, retained by it, and which it is well able to repay. If there is to be reimbursement of the dues collected as specified in the remedy, if such reimbursement has anything to do with the effectuation of the purposes of the Act, then that reimbursement must be from Union which has in its possession the funds so collected. To require Company to pay this money would be the imposition of a penalty rather than a remedy to effectuate the purposes of the Act, and constitute taking of property without due process of law.

Here there was joint action, but only Union benefited financially thereby. If Company is required to reimburse employees for dues collected for, paid to, and retained by Union, Union will be unjustly enriched, and Company will be paying for deductions from which it derived no benefit. This result would accomplish only an unauthorized punishment of Company, rather than constituting a remedial action to effectuate the purposes of the Act.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the writ of this Court be issued.

Dated, Sacramento, California,
August 15, 1967.

Respectfully submitted,
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Campbell Soup Company.

(Appendices Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

National Labor Relations Board, Petitioner, vs. Campbell Soup Company and Butchers Union Local 127, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Respondents.	No. 21,297

[May 23, 1967]

On Petition to Enforce an Order of the
National Labor Relations Board

Before: Merrill and Browning, Circuit Judges, and Taylor, District Judge

Merrill, Circuit Judge:

This case is before the court upon petition of the National Labor Relations Board to enforce its order issued against respondents on June 16, 1965, following proceedings under §10(c) of the National Labor Relations Act, 29 U.S.C. §§151, *et seq.* The Board's decision and order are reported at 152 N.L.R.B. 1645 (1965).

The Board found that respondent company, by requiring newly hired employees to join respondent union immediately, as a condition of employment, by furnishing new employees with union cards, by deducting union dues and initiation fees from the employees' pay during the first thirty days of employment[1] and forwarding these deductions to the union, thereby assisted the union in violation of §8(a)(2) and (1) of the Act. The Board found that the company and the union, by jointly engaging in a practice whereby newly hired employees were required to join the union and pay union dues and initiation fees during the first thirty days of employment, violated §8(a)(1), (2) and (3), and §8(b)(2) and (1)(A) of the Act.

The Board's order directs respondents to cease and desist from checking off union dues for employees pursuant to membership dues checkoff authorizations, unlawfully obtained from the employees prior to the thirty-day statutory period, and from in any like or related manner interfering with employees in the exercise of their §7 rights, and to post the usual notices. The Board further ordered respondents, jointly and severally, to reimburse all employees hired within six months[2] prior to the time the charge was filed in this case for their first month's dues, and to reimburse those employees who, during the same period, paid

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[1] §8(a)(3) permits an employer, pursuant to agreement with a union, to require union membership "after the thirtieth day following the beginning of such employment."

[2] 29 U.S.C. §160(b) (1964) precludes a Board complaint "based upon any unfair labor practice occurring more than six months prior to the filing of the charge * * *."

initiation fees but worked less than thirty days for the initiation fees so deducted.

The union challenges the Board's finding of an unfair labor practice, asserting that the newly hired employees voluntarily joined. In our judgment the Board's finding is supported by substantial evidence.

The union's main attack is upon the Board's order that reimbursement apply to all employees hired within the time limits specified in the order. It contends that the remedy of reimbursement should be limited to the one employee who filed the unfair labor practice charge with the Board.

The union first contends that the charges filed were not broad enough to encompass any conduct other than that which occurred in the case of the charging individual. We do not so read the charges. They were that "Madeline Ritchey and others" had been "required" or "caused" to become members of the union as a condition of employment, and that "by these and other acts" respondents had "coerced and restrained employees" in violation of §7 of the Act.

The union's principal contention is that the order is contrary to an agreement of settlement reached by the Board and the union, which limited reimbursement to Madeline Ritchey. There is no question but that such was the nature of the agreement as proposed by the Board's field examiner and acceded to by the union, and that this proposal was the express subject of an exchange of correspondence. The trial examiner found that an agreement had been reached.

The Board's ruling to the contrary was based upon the fact that the agreement had not been approved in writing by the Board's regional director, but instead had been rejected by him for the reason that without extending reimbursement to all those ultimately covered by the Board's order, a complete remedy for the unfair labor practice would not be provided.

The field examiner, in forwarding a copy of his proposed settlement agreement, had stated that it was being recommended by him "subject to the approval of the regional director." Settlement agreements are the subject of NLRB Statement of Procedure §101.7, which expressly states that agreements are "subject to the approval of the regional director."

The union vigorously contends that it is unwise to stand upon the requirement of approval and to construe that requirement as for approval in writing. It echoes the views of the trial examiner, who ruled that the proposed agreement should bind the Board; he reasoned that a contrary rule would impart an undesirable degree of uncertainty to settlement negotiations and discourage negotiation in the field.

The Board, however, found other considerations to be more impelling. It stated:

> "We reject the trial examiner's conclusion that there are 'any number of ways' in which the regional director can give his approval to a settlement agreement. In our opinion it is necessary that the regional director expressly approve in writing the offered settlement in its totality after

all disputed issues are resolved. Anything short of this position opens the door to possible confusion and misunderstanding as to whether or not a settlement has been effiectuated, as in the instant case."

Such policy decisions clearly are within the broad discretion of the Board.[3] The question here relates to the wisdom of the rule in the public interest rather than to the injustice of strict construction in a particular case. Further we do not find here a completely arbitrary departure from settled administrative practice, such as has been felt to warrant judicial intervention. *Cf., Sunbeam Television Corp. v. FCC,* 243 F.2d 26 (D.C. Cir. 1957).[4]

The company attack on the Board's order is directed to the fact that the company has been made responsible for reimbursement jointly and severally

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[3]"Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 194 (1941).

[4]The Board itself, in past cases, has recognized the policy considerations noted by the trial examiner, but the force given to them has depended on the circumstances of the particular case. *Sherry & Gordon Co.,* 107 N.L.R.B. 113 (1953); see also *United Dairy Co.,* 146 N.L.R.B. 187 (1964); *Tomkin Motor Lines, Inc.,* 142 N.L.R.B. 1 (1963); *Jackson Mfg. Co.,* 129 N.L.R.B. 460 (1960); *Corn Products Refining Co.,* 22 N.L.R.B. 824 (1940); *Wickwire Bros.,* 16 N.L.R.B. 316 (1939); *Godchaux Sugars, Inc.,* 12 N.L.R.B. 568 (1939); *Shenandoah-Dives Mining Co.,* 11 N.L.R.B. 885 (1939). All prior cases are distinguishable from the case before us, and we disagree with the union's contention that there existed any established rule contrary to that here announced. Arbitrary disregard of this rule in the future would present a different question. See *Burinskas v. NLRB,* 357 F.2d 822 (D.C. Cir. 1966).